pecially, of the right of a party to an action based upon a judgment rendered in another state, to show *dehors* the record that he was not a resident of that state, or within the jurisdiction of the court, and that an attorney who appeared for him was unauthorized. The following cases hold that he may do so: *Harrod* v. *Barretto*, 2 Hall (N. Y.) 302; *Aldrich* v. *Kinney*, 4 Conn. 380; *Shumway* v. *Stillman*, 6 Wend. 447; *Hall* v. *Williams*, 6 Pick. 232; *Shelton* v. *Tiffin*, 6 How. 163; *Pennywit* v. *Foote*, 27 Ohio St. 600; *Sherrard* v. *Nevins*, 2 Ind. 241; *Pollard* v. *Baldwin*, 22 Iowa 328; *Norwood* v. *Cobb*, 15 Tex. 500; *Watson* v. *New England Bank*, 4 Metc. (Mass.) 343; *Houston* v. *Dunn*, 13 Tex. 476. For an expression of the opposite view, see *Wilcox* v. *Kassick*, 2 Mich. 165, and *Baker* v. *Struebraker*, 34 Mo. 172, following *Warren* v. *Turk*, 16 Id. 102.

E. A. C.

United States Circuit Court, Western District of Missouri.

BAKER *v.* THE KANSAS CITY TIMES CO.

In an action for libel, where defendant justifies a charge of crime, the defence must be established to the entire satisfaction of the jury, by which is meant that the evidence must produce an abiding conviction upon the minds of the jury of the truth of the charge; but the defence need not be established beyond a reasonable doubt, or with the certainty required to sustain an indictment.

In such a case the party charged with a crime is presumed to be innocent, and the burden of proof is on the plaintiff to establish the guilt of defendant, and where there are acts or statements of the defendant fairly admitting of two meanings, the jury should apply the meaning leading to innocence rather than guilt.

The truth of an alleged libel is, when established, a complete justification of the publication, and bar to the action.

But a party failing to establish his plea of justification, may show, in mitigation of damages, anything tending to establish that he acted without malice or bad intent, but from proper motives.

Absence of actual malice is no bar to an action of libel where the publication is not privileged. The malice implied by law is sufficient upon which to maintain the action, and this cannot be rebutted so as to defeat the action.

Where a plea of justification is not sustained, it is the duty of the jury to award damages to the plaintiff, but the amount thereof should be left to their discretion.

Semble, a party under reasonable apprehension of danger of life or great bodily harm, has a right in self-defence to take the life of the aggressor, but he must have had no agency in bringing about the danger upon which he relies to justify the taking of life.

In law, one becomes an accessory who is guilty of an act of felony, not by committing the offence in person, or as a principal, but by advising or commanding another to commit the crime.

THIS was an action for libel; plea justification. The facts sufficiently appear in the charge.

M. J. Leaming, *A. B. Jetmore* and *H. B. Johnson*, for plaintiff.

John K. Cravens and *John W. Wofford*, for defendant.

KREKEL, J., charged the jury as follows: During the year 1877, there were published in Topeka, in the state of Kansas, two newspapers, one called the *Commonwealth*, owned and controlled by Floyd P. Baker, the plaintiff in this suit, the other called the *Blade*, controlled by J. Clark Swayze. During the same year, 1877, two other newspapers were published, one in Leavenworth, in the state of Kansas, known as the *Leavenworth Times*, the other in Kansas City, in the state of Missouri, known as the *Kansas City Times*, published by the defendant in this suit. The paper issued by this corporation is under the management and control of Morrison Mumford, who has testified in the case. In the Sunday's issue of the *Kansas City Times*, of April 1st 1877, a communication appeared, dated Topeka, Kansas, March 29th 1877, signed M. C. M., in which reference is made to Baker, plaintiff in this action, as follows:

"The cloud of sorrow, caused by the felonious killing of J. Clark Swayze, has not yet passed away in this city; on the contrary, it thickens every hour, and the funeral of Mr. Swayze to-day, places a condemnation upon the villainous part which F. P. Baker took in the sacrifice of his life, seldom visited upon the acts of any man * * * It was undoubtedly the object of those who conspired against the life of Mr. Swayze—Baker in particular—to murder the *Blade* by killing its editor; but in this they have signally failed, as the numerous assurances on part of the business men of Topeka, that the paper should have their undivided support, will show. I am reliably informed that ten new names were handed into the office last evening as subscribers to the *Blade*, all of whom had previously taken the murderer's organ."

Of these two extracts, taken from, and a part of the correspondence, Baker, the plaintiff, complains and brings his action against the *Kansas City Times* for damages.

To this complaint the defendant, the *Kansas City Times*, answers by setting up, first, the facts and circumstances under which the publication was made; next, a justification, alleging "that said letter is true, for that the said F. P. Baker did, on the 28th day of March 1877, and for some considerable time prior thereto, encourage and countenance the said John W. Wilson, in hostile acts toward the said Swayze, and in assaults upon the said Swayze, by

the said Wilson, and so encouraged and supported by plaintiff said Wilson, did, on the 28th day of March 1877, kill the said Swayze."

It becomes unnecessary to examine whether these pleas are technically and formally correct, for they have been replied to and treated as substantially sufficient. As this plea of justification disposes of the case in favor of the defendant, if found to be true, it is proper that it should be taken up first.

You will have to ascertain, in the first place, whether the correspondence charges that Swayze was murdered—that is, killed by Wilson, deliberately and with malice aforethought, for it would not be murder if Wilson had killed Swayze in self-defence. Should you come to the conclusion that the correspondence does charge that Wilson murdered Swayze, it will become your duty, in the second place, to ascertain whether the charge is true. The defendant, the *Kansas City Times*, makes this allegation and is bound to prove it to your entire satisfaction. Now, for the purpose of ascertaining whether Wilson murdered Swayze, or acted in self-defence when he killed him, you will bring before your mind all the facts and circumstances testified to, existing prior to the killing, in order to arrive at the motives and intent with which Wilson went across the street and sought Swayze, as well as to ascertain the motives of Swayze in acting as he did. Wilson had a right to cross the street and remonstrate with Swayze against the publications in the *Blade*, and if that was the sole purpose with which he addressed Swayze, Wilson was in the right. But in trying to arrive at the intent of Wilson crossing the street and addressing Swayze, it will be proper for you to take into consideration the existing feeling and apprehensions of the parties, and if you shall find that Wilson calculated thereon as probably bringing about a personal difficulty—seeking rather than avoiding such—he, Wilson, being prepared, and intending, if such difficulty occurred, to make use of it for the purpose of killing Swayze, in such a case, Wilson cannot be said to have acted in self-defence, and the killing of Swayze would be murder. A party under reasonable apprehension of danger of life or great bodily harm, has a right in self-defence to take the life of the aggressor, but he must have had no agency in bringing about the danger upon which he relies to justify the taking of life. Should you, after a careful examination and consideration of the facts and circumstances testified to and connected with the case, come to the conclusion that Wilson, when he killed Swayze, acted

in self-defence, then the defendant fails in making out his plea of justification, and you should find that issue for plaintiff. But if you shall find that Wilson did not act in self-defence in the killing of Swayze, then it becomes necessary for you to consider whether in the language of the plea of justification the plaintiff, Baker, encouraged, countenanced and supported Wilson in the murder of Swayze, so as to make him, Baker, accessory thereto.

In law, one becomes an accessory who is guilty of an act of felony, not by committing the offence in person, or as principal, but by advising or commanding another to commit the crime. You are therefore to determine from the testimony in the case whether Baker advised or commanded the murder of Swayze. The part of the answer setting up justification charges Baker with encouraging, countenancing, and supporting Wilson, terms of no well-defined legal signification when applied to a case such as the one before the court. I construe them to mean a legal justification, namely, the advising or commanding Wilson to murder Swayze. In trying to arrive at a conclusion as to whether Baker advised or commanded Wilson to murder Swayze, Baker is to be treated and considered by you as innocent of the crime of being accessory to the murder of Swayze by Wilson. The guilt of Baker must be shown by the defendant to your entire satisfaction, by which I here and elsewhere mean that the evidence in the case must produce an abiding conviction in your mind of the guilt of Baker.

You should with care go over all the testimony in the case, and if you find expressions used or acts done by plaintiff, Baker, fairly admitting of two meanings, you are authorized to apply the meaning leading to innocence rather than guilt. In passing from this plea of justification I sum up as follows:

First, ascertain from the correspondence complained of whether it intends to charge that Wilson murdered Swayze, and that Baker was accessory to the murder, and if you find that this is the case, you will next find whether Wilson did murder Swayze, or did the killing in self-defence. If you find that Wilson acted in self-defence, that ends the plea of justification, for there could be no murder when the killing was done in self-defence.

If you shall find that Wilson did not kill Swayze in self-defence, but committed a murder, you will next find whether Baker was accessory thereto, by advising or commanding the same. If you

shall find that Baker was not accessory to the murder, such finding will end the plea of justification in favor of plaintiff.

If you shall find that Wilson murdered Swayze, and you shall further find that Baker was accessory to the murder of Swayze, such finding establishes the plea of justification, ends the case, and you should find for defendant.

Turning from the plea of justification to the plea in mitigation pleaded by the defendant, I proceed to present the law regarding it, so that you may have the whole case before you.

The law, proceeding upon the presumption of innocence, assumes when a crime is charged upon any one that he is innocent thereof, and presumes the charge to have been maliciously made. The author or publisher is permitted, as already explained, to show that the charge made is really true, and that the person charged is or has been guilty of the crime imputed to him. Upon sustaining the charge, the one making it is acquitted and stands justified, that is if he sustain his plea of justification.

But if he fails to sustain his plea of justification, the author or publisher may show, in mitigation of damages, anything tending to establish that he acted without malice and bad intent, but from proper motives.

In cases such as the one under consideration the law will not allow the author or publisher to go free if he fails to establish his plea of justification, though he satisfy you of the purity of his motives and the greatest prudence and care in making the publication. The law requires publishers not only to be satisfied of the truth of the charges he publishes, but he must also be able to establish them to the satisfaction of a jury, in case he is sued. If the plea of justification pleaded in this case has not been made out by the defendant, it will then be necessary for you to examine into the mitigating circumstances in evidence, so as to enable you to determine the good faith, prudence and caution exercised by the defendant in making the publication, as upon this, in a large measure, must depend the amount of damages which you may assess against the defendant. You will call to mind the undisputed fact that the correspondent, Morris, was not connected with the *Kansas City Times*, and determine whether more or less care should be required at their hands when receiving a correspondence from a stranger. The manner in which the correspondence was received, the gravity of the charge and the action of the conductor of the *Times*, in refusing

or neglecting to retract the charges made in the communication, when his attention was called to it by the plaintiff, are proper for your consideration, as is also the duty which the conductor of a newspaper such as the *Times* owes to the public, as well as the legal obligation which he is under to the plaintiff. You are to guard, on the one hand, the right of plaintiff, and on the other the freedom of the press, which is measurably involved in cases of this kind. There is no claim for special damages made by plaintiff, and none has been proven. While it is your duty, in case the plea of justification has not been made out, to find damages against this defendant, the amount thereof is left to your discretion, which you will exercise with due regard to the parties.

I. The court instructed the jury that "while it is your duty, in case the plea of justification has not been made out, to find damages against the defendant, the amount thereof is left to your discretion, which you will exercise with due regard to the rights of both parties." It is submitted that the court should have laid down definite rules by which damages should have been measured. In *True* v. *Plumley*, 36 Maine 466, the court, at the Nisi Prius trial, had instructed the jury as follows: "As to damages, you will consider the pain and anguish occasioned by defendant's slander, the cost and trouble, the suffering occasioned by that slander, her prospects in life as affected thereby, the wealth and position of the defendant, and his power therefrom to injure, and give such damages as she is entitled to;" and APPLETON, J., speaking for the full Supreme Court, after reviewing the authorities in regard to the proper rules by which to assess damages in this class of cases, says: "Whatever rule may be the true one, the plaintiffs are entitled to such damages as upon the evidence can be awarded in conformity therewith, and not to damages assessed upon other erroneous principles. Now, no rule was given to the jury. Are they, then, to be a law unto themselves and, freed from all legal restraints, to assess damages at their own will and pleasure? The jury were directed to give the plaintiffs the damages to which they were entitled. To what are the plaintiffs entitled? The question unanswered recurs. To damages which are simply compensatory, and to the full extent of any injury sustained? To those which would, by way of example, be sufficient to deter others, or to such as, beside compensating and deterring others by example, may impose a punishment on the defendant as for a crime, thus infusing into the civil proceedings the effect of a criminal procedure, and erecting the jury into a tribunal which shall in each case impose the penalty? Either of these principles might have been adopted by the jury. Which, in fact, they did adopt we know not and cannot know. As was remarked by ROGERS, J., in *Rose* v. *Story*, 1 Barr 190, where somewhat similar instructions were given, 'this is giving them discretionary powers without stint or limit, highly dangerous to the rights of the defendant. It is leaving them without any rule whatever.' Most of the various matters referred to in this instruction might be regarded as elements proper for the consideration of the jury; but still some rule should have been given to the jury, unless the law is that they are to determine the damages without

any restraints, and in each case according to their arbitrary discretion. * * * A new trial must therefore be granted."

An able writer, in a recent work, lays down the rule respecting the duty of the court to instruct the jury as to the rules by which they are to be governed in arriving at the damages to be given, as follows: "The amount of damages is to be determined by the jury, but the court should instruct them as to the rules by which they should be governed in fixing the amount. A general instruction to find such damages as, under all the circumstances, they thought right, was held to be improper:" Townshend on Slander and Libel, § 289. There is no possible distinction between the instructions condemned by these authorities and the one given by the court in this case. The law is clear and conclusive that some fixed rules should have been laid down for the ascertainment of damages: Sedg. Meas. Dam., 6th ed., 771.

The court should have directed the jury, even though there was no evidence of malice, to give compensatory damages, which would include the cost and trouble of disproving the libel: *Armstrong* v. *Pierson*, 8 Iowa 29; Townshend on Slander and Libel, § 289. The court should al o have instructed the jury to give such damages as would compensate plaintiff for all the mental suffering which would naturally be caused by such a publication: Sedg. Meas. Dam. 674; *Swift* v. *Dickerman*, 31 Conn. 285; *Miller* v. *Roy*, 10 La. Ann. 231; *Dufort* v. *Abadie*, 23 Id. 280, *Fry* v. *Bennett*, 4 Duer 247. In addition to this, the court should have instructed the jury that if the publication of the article complained of was attended with circumstances of oppression, negligence or malice, they should give exemplary damages, not only to compensate the plaintiff, but to punish the offender: *Buckley* v. *Knapp*, 48 Mo. 152; *Clements* v. *Malony*, 55 Id. 352; *Snyder* v. *Fulton*, 34 Md. 128; *Sanderson* v. *Caldwell*, 45 N. Y. 398.

II. The court instructed the jury that "A party under reasonable apprehension of danger of life or great bodily harm, has a right, in self-defence, to take the life of the aggressor, but he must have had no agency in bringing about the danger upon which he relies to justify the taking of life." It is submitted that the true rule had just been stated by the court, but this proposition stood as a distinct and independent one. The principle is well settled that one person cannot attack another, and then rely upon the danger thus brought upon himself by a resistance of that attack to justify taking life: *State* v. *Starr*, 38 Mo. 270; *State* v. *Linney*, 52 Id. 40; *State* v. *Underwood*, 57 Id. 40; *State* v. *Brown*, 64 Id. 367. This principle, however, presupposes that the party bringing on the difficulty and finally taking life, has done some unlawful act, has had some criminal or unlawful agency in bringing the danger upon himself. But the instruction given in the principal case does not distinguish between lawful and unlawful agency. Wilson approached Swayze and spoke to him shortly preceding the killing. This was a lawful act. One theory was that he did this solely for the purpose of remonstrance against newspaper abuse, while another theory was that he intended to provoke Swayze to attack him and furnish a reason for homicide. In either case he had an "agency" in bringing about the danger he was placed in by Swayze's attack. The language of the court was therefore too broad, and had a tendency to mislead the jury.

III. The plea of justification was wholly insufficient. The justification must be as broad as the charge, and of the very charge: Town. Slan. and Lib., § 212; Folk. Stark. Slan. and Lib., § 692 and note 1; Id., § 694 and note 2; Id., § 701 and note 4. And where the charge is general, the plea

of justification must state the facts specifically to sustain the same, and where it is a charge of crime, the plea must specify the crime and show its commission with the same certainty as in an indictment. In other words, it is not sufficient to answer that the charge is true, but the facts which show the same to be true must be stated: Town. Slan. and Lib., §§ 355 and 358; Folk. Stark. Slan. and Lib., § 483 and notes 16 and 18; *Atteberry* v. *Powell*, 29 Mo. 429; *Smith* v. *Tribune Co.*, 4 Bliss 477; *Shepard* v. *Merrill*, 13 John. 475.

IV. The court instructed the jury that the plea of justification must be established by defendant "to your entire satisfaction, by which I here and elsewhere mean that the evidence in the case must produce an abiding conviction in your mind" of the truth of the charge, and declined to instruct that the offence charged must be proven beyond a reasonable doubt, or with the certainty required to sustain an indictment. This is a vexed and still unsettled question in the law. The authority of the text-writers, it is submitted, is against the rule laid down in the charge: 2 Greenl. Ev., § 426; Townshend on Slander, § 404. In some cases, where the defence is on the ground of fraud or crime on the part of the plaintiff, as in *Scott* v. *Home Ins. Co.*, 1 Dillon 105, where, in an action on a policy of insurance, the defence was that plaintiff had set his own house on fire, it must be conceded that the weight of authority is in favor of the rule in civil, and not that in criminal, cases. But these authorities do not apply to a case of libel. See, however, the authorities collected and the subject ably discussed in the note to *Kane* v. *Hibernia Ins. Co.*, 17 Am. Law Reg. N. S. 302.

H. B. JOHNSON.

Supreme Court of Mississippi.

SCHMIDLAPP ET AL. *v.* S. D. CURRIE ET AL.

One partner cannot convey firm assets in satisfaction of a private debt, to the exclusion of firm creditors, without the assent of his co-partners.

He may do so, however, if the entire firm participate in the assignment. This, of course, where there is no fraud.

The lien of a firm creditor on firm assets is not superior to that of an ordinary creditor upon the property of an individual debtor.

The doctrine of the primary application of firm assets to firm debts, and individual property to individual debts, is only a principle of administration adopted by the courts when called upon to wind up the firm business, and they find no valid change or disposition of the assets has been previously made by the members; but the principle itself springs out of the obligation to do justice between the partners.

THE case is fully stated in the opinion.

The opinion of the court was delivered by

CHALMERS, J.—Harvey & Washington were partners in a liquor saloon, the former having contributed the capital and the latter his services. Harvey having become indebted to Odeneal, transferred to him, in part payment of the indebtedness, and with the knowledge